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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1084 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

Opinion of the Court Below.

The Opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, *vs.* Peoria and Pekin Union Railway Company, a corporation, is reported in 134 Fed. (2nd) 860. It also appears on pages 292 to 309 of the printed Record.

Jurisdiction of This Court.

Petitioner has filed its Petition for a Writ of Certiorari under Sec. 240, Judicial Code, as amended by Acts of Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28 U. S. C. A., Sec. 347. This Court is being asked to issue its writ to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, hereinabove designated.

STATEMENT OF THE CASE.

Petitioner has omitted so many salient elements of the case that it becomes necessary to supply the omissions so that this Court will be fully informed.

The Issues.

The Amended Complaint confined the charges of negligence to two specifications, (First) that the Respondent in the operation of its East Peoria yards had promulgated and adopted its Rule 30: "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents", and that Defendant violated said rule by causing an engine to be moved without ringing a bell, which violation is alleged to have caused the death of Harold C. Tennant; and (Secondly) that Respondent failed to exercise ordinary care to ascertain the whereabouts of Harold C. Tennant while working about one of Respondent's trains as a member of the switching crew, and carelessly caused the engine and cars to be moved when the whereabouts of the said Tennant were unknown. (Rec. 2-4.)

The Answer filed by Respondent herein denied these charges specifically. (Rec. 6-7.) In the Respondent's response to a question for admissions of fact it was further denied that Rule 30, aforesaid, was in force in Defendant's East Peoria yard for the purpose of causing locomotive bells to be rung to warn switchmen employed in duties similar to those of Tennant at the time of his death. (Rec. 15.)

The Court below found that the case was submitted to the jury solely upon the first charge of negligence; that no request was made for submission upon the second charge, and that no complaint of the Court's action was in this

respect shown. (Rec. 293, 308.) Petitioner does not charge the Circuit Court of Appeals with error in this regard in the Specifications of Error, and hence the aforesaid second charge of negligence is not in the case. The defense of assumed risk was not made in this case.

The Facts.

Petitioner omitted to show this Court the other rules which are in the record and which were in full force and effect in the East Peoria yards of Respondent at the time of the accident. Rule 32 provides: "*The unnecessary use of either the whistle or the bell is prohibited.*" (Rec. 117.) The General Rules to employees provide:

> "They must expect trains to run at any time, on any track, in either direction."
>
> "*They must not stand on the track in front of an approaching engine or car for the purpose of boarding the same.*" (Rec. 117.)

Rule 702 provides in part as follows:

> "All employees will be expected to use the utmost care in coupling or uncoupling cars or engines to guard against personal injury and destruction of property, *and are positively forbidden to go between the cars while in motion to adjust coupler or knuckle or for any other purpose.*
>
> "It is alike dangerous to assume that signals given to the enginemen or firemen have been seen and, if seen, will be obeyed—when obedience to those signals on the part of those enginemen and firemen is essential to the safety of an employee in the performance of his duty. *He must know that the signal has been seen, understood and obeyed before placing himself in a dangerous position;*"

The Peoria and Pekin Union Railway Company is a switching railroad, extending between Peoria and Pekin, Illinois. It operates yards in East Peoria extending in a southerly direction from Washington Street, in East

Peoria, to what is known as Wesley, a distance of about 6,000 feet, these yards being divided into two parts, one known as "A" yard and one as "B" yard, the "B" yard being on the north end, and each yard having 42 tracks. (Rec. 108.) They are separated by ladder tracks, and each of the 42 tracks connect with these ladder tracks. At the north end of "B" yard there are also lead or ladder tracks and each of the 42 tracks of that yard connect therewith. (Rec. 109.) One of the lead tracks at the north end of "B" yard extends north across Washington Street to the various industries, and this is called the industrial lead. (Rec. 109.) The other lead is known as the Nickel Plate lead, also extending across Washington Street and connecting with the T. P. & W. and Nickel Plate main tracks. (Rec. 109.) The Respondent has a number of tenants which use its rails and bring their trains into the East Peoria yards, these being the C. & I. M., the Illinois Central, the Peoria & Eastern, the Nickel Plate, Pennsylvania, the Chicago & Alton and the Northwestern. (Rec. 109.) They uncouple their engines from their trains and the Respondent with its engines and crews breaks up these trains and classifies the cars into various tracks. Thereafter the Respondent switches these cars to their destinations and also makes up outgoing trains for said tenants in the East Peoria yards. (Rec. 110.) It is undisputed that the East Peoria yards is a place of intense switching activity. At times there are as many as eight or ten engines working close together along the leads and inside tracks. Constant ringing of bells would tend to confusion. (Rec. 127.) There are no public road crossings over "A" or "B" yard. In fact, there are no crossings between Washington Street in East Peoria and the Wesley crossing, about two miles south thereof. (Rec. 121.) Track "B-28" (where the accident occurred) is one of the tracks of "B" yard and connects with the northerly diagonal lead tracks through "B-28 Inside Switch". A track called the "30

Lead" extends from the "B-28 Inside Switch", proceeds in a northwesterly direction through a puzzle switch, and connects with the industry lead. (Rec. 111.) The "30 Lead" connects with all the tracks from "B-28" to "B-42". Track "B-41" connects with this lead at "41 Switch", a considerable distance north and west of "B-28 Inside Switch". This is all shown upon a map introduced in evidence as "Defendant's Exhibit 2", but it is not known whether this map has been brought before the Supreme Court with this record.

On July 12, 1940 it was the duty of Tennant's crew to move a cut of cars, previously classified on track "B-28", to the repair track "B-41". This switch movement was a nightly occurrence, done as a routine matter by the same crew every night. (Rec. 116.) This crew had what was called the East Peoria industry assignment, with various routine jobs to perform every night. They went on duty at eleven o'clock in the evening and went off at seven o'clock in the morning. One job was to take industrial cars to Caterpillar Tractor Co. and other plants in East Peoria. Another was to take cars which had been collected in "B" yard for interchange with the T. P. & W. railroad. (Rec. 227.) Switchman Bonner, fieldman of Tennant's crew, testified that there was nothing unusual or difficult about the switching operation in taking the cars from track "B-28" and moving them to the repair track; that it was always handled in virtually the same manner. (Rec. 227.)

Harold C. Tennant entered service as a switchman for the Respondent on August 1, 1936. (Rec. 120.) He had previous service with the C. B. & Q. at Creston, Iowa. (Rec. 121.) He was instructed and examined as to the rules of the Respondent, their meaning, interpretation and application at the time of his employment. At that time Rules 30 and 32 were explained to him and he was told that they were to be read together. (Rec. 121.) He was

again examined and instructed in the rules in November, 1939. *At that time witness Keeler, Assistant Superintendent, again explained to him that Rules 30 and 32 were taken together and that in yard switching in the East Peoria yards engine bells would not be rung for the purpose of warning members of the crew, unless an engineer knew a crew member to be in danger.* (Rec. 122.) All engineers and switchmen were instructed as to the meaning of these rules. (Rec. 119.) Keeler further testified that these men were told that under Rules 30 and 32 it was not necessary that the bell be rung every time an engine was started on a track for the reason that each crew member was supposed to watch the movements of his own engine, that if all the engines about the yard rang the bell every time they stopped and started, the bell would lose any virtue it had as a warning to any one who might be on or about the tracks. Keeler further testified that he told the men it was not necessary to ring the bell in yard switching unless there should be some car men, section men or some one like that about the track, since all members of the switching crew were expected to know what movements were being made and to provide for their own safety. (Rec. 121.)

"Q. Are the switchmen told that the bell would not be rung to warn switchmen who are working on the crew of that particular engine?

A. Those instructions are it is not necessary to ring the bell under those conditions.

Q. Isn't it a fact that the men are told that engineers operating the switch engines in East Peoria will not ring the bell unless they know somebody is in danger?

A. They are told and instructed to that effect.

Q. But ordinarily, unless the engineer knows somebody is in a position of danger, the bell will not be rung?

A. No.

Q. Is that what the men are instructed?

A. That is the instruction.

Q. Are they instructed that rules 30 and 32 are considered and read together?

A. They are read together." (Rec. 119-120.)

"Q. What did you tell Harold C. Tennant with reference to rules 30 and 32?

A. I told him those rules were to be read together, and that our instructions were it was not necessary for an engineer or fireman to ring a bell every time an engine started and stopped, but were required to ring the bell when passing over road crossings or along repair tracks, or where men were working and the bell was used as a warning." (Rec. 121.)

Keeler was thereafter asked what he had explained to Tennant the second time he examined him on the rules, as follows:

"Q. Was it explained to him in yard switching in the East Peoria yards that engine bells would not be rung for the purpose of warning members of the crew unless the engineer knew the crew members were in danger?

A. It was.

Q. When you discussed rules 30 and 32 with Tennant, did he acknowledge he understood them?

A. He had the proper understanding, or else I would not have permitted him to go to work." (Rec. 122.)

About seventy-five per cent of Tennant's work was in the East Peoria yards. The entire month of June and the month of July, up to the time of his death, was entirely in said yards. (Rec. 123.)

In the month of March, 1940 he worked on this same East Peoria industry assignment the 7th, 17th, 19th and 20th. In April, 1940 he worked on this same assignment on the 10th, 11th, 12th and 13th. In the month of May, 1940 he was on the same industry assignment the 14th, 15th, 16th, 18th, 20th, 21st, 22nd, 23rd, 25th and 29th under Foreman Harkless and engineer England. (Rec. 123-124.)

In June he was on this assignment the 1st, 5th, 6th and 8th, and in July he worked on it the 9th, 10th and 11th, with Harkless as his foreman and England as his engineer. (Rec. 124.) Prior to this time he had worked with engineers Wiedeman, Coon, Pratt and Bruning, all of whom had been locomotive engineers for more than twenty-five years. (Rec. 140-152.) They had all been instructed in the rules of the Respondent and had had occasion to observe the practices and customs of switching in the East Peoria yards. Engineer Wiedeman testified that under Rules 30 and 32, as he was instructed in them, and as they were carried out, bells should not be rung on locomotives in the East Peoria yards unless the engineer knew that some one was in a position of danger; that he worked nights most of the time, and that he never rang the bell unless he saw somebody in between the cars or at crossings; that that was the only time they rang the bell at night. (Rec. 141-142.)

Engineer Coon, with twenty-eight years of service, stated that under the rules bells were not rung in the East Peoria yards for the purpose of warning members of his own crew not known to be in a position of danger; that this applied not only during operations in coupling up cars on tracks, but also when moving cuts of cars out onto the lead. (Rec. 145.) Engineer Pratt, with thirty years' service, had observed the customs and practices of operating switch engines in the East Peoria yards, and had been examined with reference to the rules. He considered Rules 30 and 32 as being together and that under these rules, and from his observation, bells were not rung in said yards when cars were being coupled up or moved out onto a lead for the reason that there is continual switching and the bells would cause confusion. (Rec. 148.) Pratt further testified that every member of a switching crew has certain definite duties, and he is supposed to know what those duties are; that the engineers assume that each

man is doing his duty and that one of them is to keep alert and keep clear of danger. There is no practice in the East Peoria yards requiring an engineer to look around to see where the members of his crew are before he can move his engine, and a bell is not rung for a crew unless it is actually known that he is between the cars or is in a position of danger. (Rec. 148-149.) Engineer Coon further testified that the mere fact that a pinpuller (which was Tennant's job on the night of the accident) gets out of sight of the engineer, is no indication that the man is in a position of danger. He is to protect his own safety in that case, and the engineer assumes that he is performing his regular duties and keeping alert for his own safety. (Rec. 151.)

All these engineers testified that there was no practice in the East Peoria yards that an engine must stand still until the engineer discovers the whereabouts of every member of the crew, but, on the contrary, that they moved their engines upon signal, since the crew members were familiar with the movements and were assumed by the engineers to be looking after their own safety. (Rec. 148, 149, 151, 169.)

Tennant had also worked with Foremen Stringer and Hancock. (Rec. 155, 164.) Stringer testified that in switching in the East Peoria yards, under Rules 30 and 32, an engineer does not use a bell or whistle if he does not know that a member of the crew is out of place or in a position of danger. (Rec. 154.) Foreman Hancock testified that a bell might be rung in the East Peoria yards for the purpose of warning section men or anybody who was not part of the crew, but that the bell was not rung for the purpose of warning the crew members. (Rec. 162.) Stringer explained that an engineer does not see all members of his crew at all times when working in the leads or in the yards in East Peoria; that there are quite a number of times when a man will be on top of a car and the man

close to him will take care of him; that another member may be out performing his duties some place else, lining switches for the current movement of the train; that the mere fact that an engineer does not see all the members of his crew, after he gets a signal to move, does not signify that anybody is in a position of danger; that the practice of switching in the East Peoria yards is that unless the engineer has positive knowledge that some member of the crew is in a position of danger, he moves the engine. (Rec. 155.) That it is only when a member of the crew happens to step in between cars, in which case the engineer knows he went between the cars, that the bell or whistle is used. (Rec. 154.) Numerous other witnesses testified to the effect that Rule 32, prohibiting the unnecessary use of the bell, qualified Rule 30 insofar as yard switching was concerned and prohibited the use of the bells when starting engines for the purpose of warning crew members, unless the engineer knew such crew member to be in danger and oblivious to the movement of the engine. (Rec. 171, 178.)

T. R. Beach, trainmaster of the Illinois Central Railroad, was familiar with operations in the East Peoria yard and he had observed that the bell was never rung unless an engineer saw some one on the track in danger. Momentary stopping and starting of engines did not cause the engineer to ring the bell. (Rec. 184.)

Harkless was the only witness called for the Plaintiff regarding operations in the East Peoria yards. He was the foreman of Tennant's crew on July 12, 1940, but was no longer in service with the company at the time he testified. Subsequent to the accident and prior to the time of his testimony he had been in a fracas with the night yardmaster and had been disciplined by being reduced from a foreman to a switchman, and admitted that he was "sore". (Rec. 73-75.) He had an unsettled claim against the company (Rec. 71-72), and he had taken Mrs. Tennant to Attorney Eagleton in St. Louis. (Rec. 72-73.) At the time of the

accident he was twenty car lengths or eight hundred feet away. (Rec. 79.) He did not know of his own knowledge how Tennant was injured. (Rec. 87.) He admitted that Tennant was an experienced man and that it was a routine job every night to enter track "B-28", pull out the cars that were in there and take them over to track "B-41". Tennant had worked with him on that routine job many times before as pinpuller and he was familiar with the job. (Rec. 77.) He admitted that in coupling up groups of cars on a track, it was not the practice to ring the bell. (Rec. 81.) His own engineer, England, never rang the bell while trains were being coupled up. (Rec. 81.) He was in charge of the cut and in charge of England, and Harkless admitted that he was used to the fact that the bell was not rung by England. (Rec. 81.) *Harkless admitted that when cars were pulled out of a track onto the lead, England only rang the bell to warn crews of other engines or pedestrians, or yard clerks, that the men on his crew knew all about the movement.* (Rec. 83-84.) He had observed that some engineers rang bells and that some didn't. (Rec. 81.) He did not say they rang bells to warn their own crew members.

Harkless further testified that after the cars had all been coupled together on track "B-28" at the time and place in question, he gave a back-up signal to the engineer. (Rec. 79.) He did not see Tennant any place. (Rec. 80.) He said that Tennant had two duties to perform, one being to see that the switches were lined up so that the train movement could go out on track "B-28" and get onto the lead, and that the other duty was to keep alert and look out for his own safety. (Rec. 80.) Harkless said that on the straight tracks in the East Peoria yards the foreman usually signaled direct to the engineer so that there was no necessity to relay the signal through Tennant. (Rec. 85.) The engineer did not have to have that signal relayed to him by the pinpuller Tennant. (Rec. 85.) Harkless did not know

how Tennant was run over since he was twenty car lengths away. If Tennant had been standing at the side of the engine, Harkless could have seen his light, but did not see it. (Rec. 85.) He said that the handholds on the footboard of the Diesel were in good condition. (Rec. 86.) There was a place on the top of the drawhead of the Diesel where a man could sit down, but that was not a proper place for a man to sit. (Rec. 86.) Tennant, he said, could have walked all the way around the north end of the engine and attempted to climb back through the cars. (Rec. 86.) He further admitted that the engineer always released the air on the Diesel before it started, and that it would make a whizzing sound, so that any one standing around the engine could hear it. (Rec. 87.) This hissing sound could be heard a car length away. (Rec. 88.)

Fireman R. E. Cole and switchman Charles W. Bonner, the other members of Tennant's crew, all testified that under the rules of the company, the instructions thereunder and the customs and practices of switching in the East Peoria yards thereunder, engine bells were not rung for the purpose of warning men performing the duties of Tennant, unless such man was known by the engineer to be in a position of danger. (Rec. 191, 214, 226.)

Engineer England testified that on the night in question one of the routine jobs was to pull the cars that had been placed on track "B-28" and place them on track "B-41". (Rec. 193.) The engine came into "B-28" from the north, the engine being headed south, with Tennant riding on the front footboard. Tennant lined all switches to get them in there. (Rec. 194.) The first car on the track was about one car length from the "B-28" switch, and Tennant made the coupling onto that car. (Rec. 194.) Harkless and Bonner walked south along the west side of track "B-28". Thereafter followed a number of movements forward and backward until all the cars were coupled up on track "B-28". (Rec. 195-196.) After the cars were all together

on the track, England saw Tennant standing on the west side of the engine putting his raincoat into a box or compartment underneath his cab window. Thereafter Tennant walked around the engine and that was the last England saw of him. (Rec. 196.) He walked around the north or rear end of the engine. (Rec. 196, 197.) England further testified that after Tennant had made the first coupling, he had no further duties to perform with reference to coupling up the track, that after he walked around the engine he had to go out on the lead and find out whether the switch was lined up for the next movement. (Rec. 197.) At this time England thought the engine was five or six car lengths in from the "B-28" switch. (Rec. 197.) England then testified that after Tennant had walked around the end of the engine and out of his vision there was a wait of about ten minutes; that it was ten minutes after he last saw Tennant. (Rec. 197.) During this time he continued to look south along the west side of the train for signals. (Rec. 197.) (Attention is here called to the fact that in Petitioner's statement of fact counsel stated that it was *during* this interval of time that Tennant was last seen alive. Actually *the ten minutes began*, under the testimony, when Tennant walked away.)

It was intended that these cars should be taken to track "41", and it would be necessary to pull back about twenty car lengths. (Rec. 197.) England stated it was the routine thing on all previous nights for Tennant to walk around the north end of the engine just the same way, and when they pulled up on the lead track over "41" switch and got ready to shove down into that track, they always found Tennant there at the "B-41" switch. England said that at the time and place of the accident that Tennant was not on either footboard. England, on cross-examination, stated that it was always his practice before starting his engine to look around to ascertain if any one was in danger, and that on this occasion, before he started his engine, he looked

from the cab of his engine and saw nobody on either the front or rear footboards. (Rec. 200.) Tennant, he said, did not ordinarily ride up to the "41" switch, but that he would walk away and walk down to the switches. (Rec. 200.) When England saw Tennant walk around the engine he thought he had gone to the "41" switch, thought he had walked down to that switch, and he did not consider him a missing man. (Rec. 213.) A missing man on a crew is somebody who had gotten down underneath the cars and is not performing his duty, or has gone off. (Rec. 213.)

Engineer England further testified that he received a back-up signal from the rear end of the cut, and after looking to see whether any one was in danger (Rec. 200), backed up, out onto the lead, some twenty car lengths, over "41" switch, so that the rear car would clear said switch. (Rec. 197, 198.)

Fireman Cole was seated on the east side of the cab. All signals, he said, were being given from the other side, the other members of the crew being supposed to be on the west side of the train. He said that he did not see Tennant walk around on his side while the train was standing still, but that he was not looking all the time. (Rec. 217.) After the engine finally started off, backing the cars out of the track that night, he then kept a lookout. (Rec. 217.) He did not see the signal given to England. The engine bell was not ringing as the cars started to move back onto the lead, but there was nothing unusual about that. (Rec. 218.) Cole did not see Tennant as the train started to move out and does not know how he was killed. He heard no shouts or outcries of any kind. (Rec. 218.) There was no rough or unusual start and the lights were burning. (Rec. 218.)

Bonner, the fieldman, had coupled up all the cars in the cut except the first car, which was coupled by Tennant. Bonner saw Tennant make the first coupling and noticed that he was still on the front footboard of the engine after

the coupling had been made. Bonner then walked down to make a coupling between the second and third cars from the engine, but Tennant was not down there with him. The men were using lanterns. (Rec. 229.) At the time it was necessary to shove down the track to couple onto the remaining cars on the track Bonner looked back toward the engine, but did not see Tennant, although he had a lantern. (Rec. 230.) After all the cars were together and after Bonner had released the brakes, he went to the rear end of the cut, waiting for the foreman who was making a list of the cars. At that time he looked back toward the engineer, but saw nothing of Tennant or his lantern. Tennant's duties, he stated, at that time were to attend to the switches and protect the cut. (Rec. 232.) He had a further duty of taking care of himself. (Rec. 232.) There was no necessity for him to relay any signals which might be given to the engineer by Harkless or himself, because this was a straight track and where the engineer could see there was no necessity for relaying any signal through the pinpuller. Bonner did not know how Tennant was killed. He did not see it. (Rec. 234.)

The facts of the discovery of Tennant's body after the accident were substantially as set forth in Petitioner's statement of facts on pages 7-8 of the Petition. The actual cause of Tennant's death was unknown and has since remained a mystery. There were no eyewitnesses and only conjectures or surmises have been advanced as to the cause of death, which will be discussed subsequently in this brief. The first evidence of blood was found on the rail 317.6 feet south of the switch point of "28 Switch", as measured by Chief Engineer Thornberry. (Rec. 113.) Keeler testified that this blood was on the outside of the ball of the west rail. (Rec. 137.) Near this blood was found Tennant's right gloved hand between the rails, with the handle of his lantern, still burning, about an inch from the fingers. Just beyond the hand there was a galvanized steel spring

about two inches in diameter and ten inches long. It was a bright, shiny object and showed up quite plainly. (Rec. 137-138.) Keeler further testified that he inspected the footboards of the engine and the safety appliances, grabirons and handholds, and found that they were all in good condition. He examined the wheels of the cars very carefully and on the outside rim of the north wheel, on the third car from the engine, he found a bit of flesh. (Rec. 138.) He found no evidence of blood on any of the wheels of the Diesel and no evidence of blood on the wheels of the first or second cars to the engine. It was not until he got to the third car from the Diesel that he found evidence of flesh. (Rec. 138.) There was evidence by witness Burch that he had noticed the habits of Tennant while working in the East Peoria yards prior to this accident, that Tennant had a habit of climbing up on the pilot beam of the engine. Burch stated that there is a footboard and handholds and grabiron and there is also a pilot beam. The footboard is placed there for men to stand on, with handholds so a man can stand securely. The pilot beam, however, is a dangerous place for a man to sit. He might slip in getting up there or he might slip in getting down. It is a high perch. If a man got up there and dozed off and the engine started he could fall off very easily. (Rec. 175.)

As we have said before, this statement of facts has been made by Respondent to supply omitted evidence which Petitioner failed to present to the Court.

On the trial of the case in the District Court, motions for a directed verdict were made at the close of Plaintiff's evidence, and again at the close of all the evidence. Both were overruled. The Trial Court refused to give any of the interrogatories tendered by Respondent. (Rec. 249.) These were set forth on pages 261-3 of the record and were tendered pursuant to Rule 49-b of the Federal Rules of Civil Procedure in connection with the motion for directed verdict. The purpose of this Rule was that the

Court might determine if the answers to the interrogatories were harmonious with such general verdict as might be brought in, in which event the Court could direct the entry of an appropriate judgment. Had the Court given these interrogatories, the jury would have been required to determine specifically the various questions of fact and whether the allegations of the Amended Complaint had been proved, and by the answers of the jury to these interrogatories, the Trial Court would have known what consideration had been given thereto. We believe that Rule 49-b was included in the Rules of Civil Procedure for a definite purpose. Thereafter the Trial Court charged the jury but adopted a prejudicial method of giving all Defendant's instructions *first* and all Plaintiff's instructions *last*. Some of Plaintiff's instructions were clearly erroneous, and these points were made to the Circuit Court of Appeals, which did not find it necessary to pass upon them. The question of the excessive amount of the verdict under the facts of contribution in the case were also preserved in Respondent's appeal from the Trial Court, although this was not passed upon. A motion was made in the Trial Court, after a verdict, for judgment notwithstanding the verdict, or in the alternative, for a new trial. This was overruled by the Trial Judge without stating reasons therefor. Appeal was perfected to the United States Circuit Court of Appeals for the Seventh Circuit, and it is from the decision of that Court, reversing the judgment of the Trial Court, with directions to enter judgment in favor of the Defendant, that the Petition for Writ of Certiorari is sought.

SUMMARY OF THE ARGUMENT.

I.

A.

Where there is an absence of direct evidence upon the cause of death and the circumstances give rise to a number of conflicting theories or possibilities of the cause of the injuries, for some of which the employer is not responsible, a jury will not be permitted to exercise conjecture or speculation in determining which theoretical assumption of facts might have been the effective cause of death. To recover, Plaintiff is not only required to prove that the railroad was negligent, but that the injury resulted proximately from that negligence.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Patton v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275.

Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151.

Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281.

Reading Co. v. *Boyer*, 6 Fed. 2d. 185.

Brennan v. *Baltimore & O. R. Co.*, 115 Fed. 2d. 555, (Certiorari denied, *Brennan* v. *B. & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614).

Willis v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, (Certiorari denied, *Willis* v. *Pa. R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187).

Deere v. *Southern Pacific Co.*, 123 Fed. 2d. 438, (Certiorari denied, *Deere* v. *Southern Pac. Co.*, 315 U. S. 819, 62 Sup. Ct. 916).

The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendant must have been guilty of some act of negligence which was the proximate cause of the injury.

Reese v. *Philadelphia & R. R. Co.*, 239 U. S. 463, 36 Sup. Ct. 134.

Wheelock v. *Freiwald*, 66 Fed. 2d. 694.

A mere scintilla of evidence is not sufficient to sustain a verdict in favor of a plaintiff, but the evidence must be substantial, not vague and uncertain.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Commercial Casualty Ins. Co. v. *Stinson*, 111 Fed. 2d. 63, (Certiorari denied, *Stinson* v. *Commercial Casualty Ins. Co.*, 311 U. S. 667, 61 Sup. Ct. 25).

Suggestions of counsel, however plausible, cannot take the place of evidence.

United States v. *Coal Cargo*, 11 Fed. 2d. 805, (Certiorari denied, *United States* v. *Cargo*, 273 U. S. 696, 47 Sup. Ct. 92).

Evidence, "however slight", is not sufficient to present a jury question. Where the evidence on one side is overwhelming, so as to leave no doubt as to facts, the court should give a peremptory instruction to the jury.

Gunning v. *Cooley*, 281 U. S. 90, 50 Sup. Ct. 231.

Where a court is left without knowledge of a fact after exploring every channel of information, it must decide against the litigant who counts upon the fact as an essential of this claim.

Shapleigh, et al. v. *Mier*, 299 U. S. 468, 57 Sup. Ct. 261.

B.

Where an injured person is not a member of the class of persons for whose benefit a warning signal should be given, he cannot recover because of a failure to give such signal.

Chesapeake & Ohio Ry. Co. v. *Nixon*, 271 U. S. 218, 46 Sup. Ct. 495.

Chesapeake & Ohio Ry. Co. v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. 42.

Central Vermont Ry. v. *Sullivan*, 86 Fed. 2d. 171.

Norfolk & W. Ry. Co. v. *Gesswine*, 144 Fed. 56.

It is not negligence *per se* for an engineer or fireman, who have no notice that a crew member has placed himself in a dangerous position, not to warn him by signal.

Douglas v. *Washington Terminal Co.*, 298 Fed. 199.

Mullin v. *Louisville & N. R. Co.*, 261 Fed. 156.

It is not a dangerous practice *per se* not to ring bells in railroad yards where switch engines are moving back and forth and the bells and whistles would tend to confusion.

Aerkfetz v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835.

Under the evidence, crew have right to assume employee will observe due care, where under the evidence he knew the practices of switching.

Toledo, St. Louis & W. R. Co. v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

II.

There can be no recovery under the Federal Employers' Liability Act for injuries resulting solely from the employee's negligence; nor can there be recovery where an employee, with liberty of action in the performance of a duty by him, neglected the same, or adopted an unsafe way when a safe way was open to him, or voluntarily violated rules promulgated for his own safety and to prevent the very accident which occurred.

Davis v. *Kennedy*, 266 U. S. 147, 45 Sup. Ct. 33.

Unadilla Ry. Co. v. *Caldine*, 278 U. S. 139, 49 Sup. Ct. 91.

Deere v. *Southern Pacific Co.*, 123 Fed. 2d. 438, (Certiorari denied in *Deere* v. *Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916).

Willis v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, (Certiorari denied in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187).

Gilbert v. *Burlington C. R. & N. Ry. Co.*, 128 Fed. 529.

ARGUMENT.

I.

The opinion rendered by the United States Circuit Court of Appeals for the Seventh Circuit in this case (Rec. 292-309), reported in 134 Fed. 2d., page 860, indicates that the record was painstakingly analyzed by that Court. Judge Major stated that he considered the proof in the light most favorable to the Plaintiff. The facts were discussed in the decision in great detail, and it was even said that the Court ignored the testimony of Defendant's witnesses, except wherein some admission was made which Plaintiff relied upon as favorable. On the issue of negligence concerning Defendant's failure to ring the bell, pursuant to Rule 30 (which that Court held to be the only issue in the case, and which finding is not complained of here), the Court stated *that the proof was overwhelming* that Rule 30 had long been interpreted not to apply to a member of the switching crew unless he was *known* to be in a position of danger; that to the same extent it was likewise shown that this was the custom and practice not only of Tennant's crew, but of the other switching crews operating in the East Peoria yards. Nevertheless, the Court concluded that under recent decisions of this Court, *Seago, Admx.* v. *N. Y. Central R. R. Co.*, 315 U. S. 781, and *Tiller, Executor, etc.* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444, proof of negligence, however slight, is sufficient to present a jury question.

Respondent does not believe that this Court, in the decisions just mentioned, intended to abrogate or rescind the long standing Federal Rule that "slight" evidence, or a mere "scintilla" of evidence, is insufficient to make a jury question, and that the evidence to support the allegations

of a complaint must be "substantial". The Circuit Court of Appeals, in its anxiety to resolve every possible implication in favor of Plaintiff, even after finding the evidence to be overwhelming against Plaintiff's contentions, was still constrained to say that a "slight" implication of negligence would have justified submission to the jury. This demonstrates that the Court below was more than fair, went further than the rules long established by this Court in scrutinizing and determining Plaintiff's right to trial by jury.

Thus far the Circuit Court of Appeals was able to go and no further when it came to the issue as to whether an alleged act of negligence was the proximate cause of the accident and whether the alleged failure to ring a bell had actually been the cause of Tennant's death. It was forced to conclude that the record was totally wanting in evidence to establish such causal connection. On page 307 of the Record the Court finally said:

> "We think we have sufficiently discussed the various theories as to the cause of the decedent's death, particularly plaintiff's theory, to demonstrate that it is shrouded wholly within the realm of speculation and conjecture."

And on page 309 of the Record the Court concludes:

> "We therefore must conclude that there is no substantial proof in support of the charge that defendant's failure to ring the bell was the proximate cause of the death of plaintiff's intestate and that the court should have directed a verdict in favor of the defendant, or allowed defendant's motion for judgment, notwithstanding the verdict."

There are, of course, two elements to be affirmatively proved by Plaintiff in a suit for damages under the Federal Employers' Liability Act: First, the Plaintiff must prove by substantial evidence the existence of some duty owed by the employer to the injured employee and negligent violation of said duty. Secondly, the Plaintiff must

prove by substantial evidence that he act of negligence was the proximate cause of the injury. *Proof of negligence alone is not sufficient.* This is the type of case, under the decisions of this Court, where it is impossible to say from the evidence what was the effective cause of the fatal injuries without complete resort to speculation, surmise and guesswork, upon which grounds a verdict will never be permitted to stand. These cases will shortly be discussed. First let us analyze the evidence and the theories and the conjectures which are all that this Court has before it upon the question of probable cause.

Engineer England was the last man of the crew to see Tennant alive. He saw him put his raincoat into the box immediately below his cab, on the west side of the engine, and then walk out of his vision around the north or rear end of the Diesel. On all previous nights, when they had been working together, and the number of times was considerable, being at least twenty times, Tennant had always walked around the north end of the engine in the same manner during this routine switching operation on track "B-28". Thereafter, on all previous occasions, England would receive a direct signal from the rear end of the cut, reverse his engine, pull out through "B-28" switch onto the lead and continue until the rear car had cleared "B-41" switch. Tennant, on all previous occasions, was at said switch, and, according to England, always walked up there. On the night of July 12, 1940 Tennant obviously did not pursue his usual custom and practice, but elected to remain somewhere in an unknown position in or around the north end of the cars, which had been collected together on track "B-28". After England last saw him there was a ten minute wait, during all of which time neither engineer England, fireman Cole, fieldman Bonner nor foreman Harkless saw Tennant. All of them have testified that they believed Tennant was performing his duties. England thought he had followed his practice of previous nights in

walking up along the lead to see that switches were lined and to wait for the cut at switch "B-41". Harkless said his duties were to walk back and see that the switches were lined or stay with the engine and observe care for his own safety. (Rec. 84.) It is patent that he did none of these things. Had he remained with the engine and observed care for his own safety, he properly could have remained on the ground, outside the rails, along the west side of the engine, where he could observe signals and where the other members of the crew could observe him. We know he did not stand there because no one saw him, although they looked in that direction at the time the signal was given for the train to pull out, and did not see him. Likewise, Tennant could have stood safely upon the rear footboard of the locomotive, where there were adequate handholds. Here too he could have observed signals on the west side of the cut and could have known when the signal to reverse the train was given. He did not do this because England has testified that he was not on the rear footboard, although he looked to see. (Rec. 200.) Nor did Cole see Tennant on his side of the engine when the train movement started, although he was keeping a lookout at that time. There is *no* evidence in the record as to what Tennant was doing or where he had stationed himself, or whether he was standing up or sitting down, or whether he was asleep or awake, or whether he was in back of the engine, or elsewhere.

Counsel for Petitioner seeks to substitute for this absence of proof his own hypothetical statement. He argues that because of the death of Tennant and the absence of eyewitnesses, it will be presumed that he was performing his duty of protecting the head end of the cut; and that for this purpose he had stationed himself between the rails just to the north of the engine and out of sight of the engineer, fireman and other crew members.

A mere presumption must fail when there is proof to

the contrary. Tennant could not have been performing his duties while at the same time violating the rules of the Company promulgated for his safety and to prevent this very type of accident. Harkless, who testified for the Plaintiff, said that Tennant had the duty *to keep alert and look out for his own safety.* (Rec. 80.) Tennant, by standing between the rails, as suggested by counsel, had placed himself so that he could not see and observe signals, in violation of Rule 702. (Rec. 117.) If he had chosen this position from which to mount the footboard when the train moved out, then he was violating the general rule which forbade employees from standing on the ground in front of an approaching engine for the purpose of boarding the same. (Rec. 117.) Another slacking operation would have run over a man in this careless position, and the record is uncontradicted that no bell was ever sounded in the yard during coupling and slacking movements. (Rec. 81.) Yet this man, under Petitioner's admission, chose this dangerous and unnecessary place to stand, when with perfect safety he might have remained with the engine, outside the rails, or on the footboard. This Court can only conclude that if it is to adopt Petitioner's theory of what Tennant was doing just prior to his death, it must find that Tennant was *not* carrying out his duty to exercise ordinary care and look out for his own safety.

If it is to be supposed that Tennant chose to stand between the rails during the ten minute waiting period, it can be conjectured with greater weight that the hissing of the air when the air brake was released gave him warning of the intended movement of the engine. It will be remembered that Harkless testified that this sound always preceded the movement of the engine, that it could be heard a car length away. (Rec. 87.) An alert man, hearing this warning, should have been able to get out of the way, but under this supposition Tennant must have elected to remain between the rails for the purpose of stepping

on the footboard as it moved toward him, missing it and being run over. Here it will be patent to the Court that if Tennant knew of the movement of the engine without the ringing of a bell; but thereafter sought to do the forbidden thing of remaining between the rails for the purpose of stepping on the approaching footboard, then it was no negligent failure to give a bell warning which was the proximate cause of death, but his death was solely and proximately caused by his own negligence.

In the opinion of the Circuit Court of Appeals still another conjectural possibility was suggested, that during the period of inactivity, after the cars were coupled together, Tennant might have sat down on the front footboard and dozed off. This is as possible and logical as some of the other conjectures in the case. If this were the fact, then Tennant had placed himself in so perilous a position that he possibly could not have extricated himself whether the bell had rung or not, and he might possibly have been insensible to the bell if it had rung.

There are other theories, based upon circumstantial evidence in the record, having even greater probability. The following is based upon Tennant's previous habits. Tennant might have gone around the north end of the engine and thereafter climbed upon the pilot beam to rest. This was a dangerous and improper thing to do. Harkless testified that there was a place where a man could sit down, but that it was an improper place for a man to sit. (Rec. 86.) Burch, night general yardmaster, said that he had observed Tennant on previous occasions sitting up on the pilot beam of the engine. (Rec. 173.) Burch said that this was a high perch and that a man might slip in getting up there or slip in getting down; also that if a man did get up there and dozed off and the engine started, he could fall off. Tennant might have fallen from this perch either before or after the engine had started. He might have fallen in getting up there or in getting down, and might

have been lying across the rail, unconscious, at the time the engine started. In such event, the failure to have rung a warning bell was no proximate cause of his death. No one knows what happened, but these are possibilities, since he had been known to adopt this negligent practice in the past.

Another deduction based on physical fact is that Tennant might have been investigating the shiny galvanized spring, because it was found in close proximity to his severed hand and lantern. (Rec. 137-138.) The spring was an attractive object and Tennant might have been crouching down, oblivious to the signals, and out of sight of all his crew members, before or after movement of the train, thrusting his arm between the rails in curiosity.

The strongest possibility in the case, based upon physical circumstantial evidence, was that Tennant might have walked around the north end of the engine and back on the east side of the cut. Harkless, Plaintiff's chief witness, said that switchmen sometimes did that and thereafter sought to climb back between the cars. (Rec. 86.) Fireman Cole did not notice Tennant on the east side, but was not looking all the time. The signals were not being given on that side. (Rec. 217.) *The third car from the north end of the cut was the only one upon the wheels of which was any evidence of the accident*, the north wheel of this car having a small bit of flesh upon it. After the accident the first blood on the west rail was found by actual measurement to be 317.6 feet from the switch point of No. "28" switch. (Rec. 113.) Engineer England was of opinion that his engine had shoved in five or six car lengths south of that switch, or a distance of two hundred to two hundred forty feet. (Rec. 197.) Harkless thought the engine had shoved in seven or eight car lengths. (Rec. 89.) Neither England nor Harkless had measured the distance. Nevertheless, this lends weight to the theory that Tennant

was not run over by the engine, but by the third car from the engine. Based on the admission of Plaintiff's witness that switchmen sometimes walked around the cut in this manner, it was possible that Tennant had gone around the east side of the cut for some purpose; that when the movement of the train started he endeavored to climb back between the second and third cars so that he would be on the proper side of the train where signals were being given; that in attempting this dangerous and forbidden practice he fell and was run over by the third car. It will be recalled that Rule 702 forbade a switchman to go between moving cars for any purpose. (Rec. 117.) If this is what he was doing, the failure to ring the locomotive bell was no cause of his death. Under Plaintiff's theory of the case, the bell should have been rung to warn switchmen of the movement of the train, *but if Tennant knew that the train was moving and thereafter sought to do such a dangerous and forbidden act as to climb between the moving cars, then his own carelessness, and not that of the employer, was the effective and direct cause of the injury.*

The foregoing are the conjectural theories which have been presented in this case as possible explanations of the cause of Tennant's death. They are all no more than guesswork. No witness knew the cause of death and it will always be shrouded in the realm of speculation. *However, one thing remains clear, that if Tennant had been performing his duties in accordance with his usual practice, or in the safe manner of performing them that was open to him, the accident would never have occurred.*

The above possibilities of the cause of Tennant's death indicate that he must have been doing some unusual, imprudent and negligent act, in violation of rules promulgated for his own safety, or any standard of ordinary care; and that if by any chance he was carrying out any duty, he had abandoned the safe method which lay open to him and adopted the dangerous and improper method. Under these

foregoing theories of death, some of which are based upon circumstantial evidence, *this Court must recognize that Tennant might have known of the movement of the train, even though not warned by a bell.* In such case the train of causation connecting his accident with a bell warning was broken. It is possible that with full knowledge that the cut was backing out onto the lead, he deliberately sought to do some dangerous act, such as climbing through moving cars, or seeking to step upon a footboard from the center of the rails, in which event his own negligence, rather than the alleged negligence of Defendant, became the sole and direct cause of death. In view of the absence of evidence in this particular case, we respectfully submit that this Court cannot determine the cause of Tennant's death without resort to guessing how it might have occurred. How then could a jury have been expected to determine the issues without similar resort to speculation and conjecture?

This is not a case where there was a conflict of evidence as to how an accident occurred. The Plaintiff has presented no evidence whatsoever. Conjectures cannot take the place of evidence. Petitioner's counsel has said that one tap of the bell might have saved his life, but here again this is guesswork, mere conjecture. Indeed, the uncontradicted facts in this record are that Tennant could not have been expecting a bell. Harkless, Plaintiff's witness, has not only testified that the bell was not rung during coupling up movements, but has further testified that when cars were pulled out of the track onto the lead, his engineer, England, only rang the bell to warn crews of other engines, or pedestrians, or yard clerks,—that the men of his crew knew all about the movement. (Rec. 83-84.) England verified this by stating he never rang the bell while switching in the East Peoria yards unless he as an engineer knew that somebody was in a position of danger. (Rec. 191, 192.) Tennant had been thoroughly in-

structed by the Assistant Superintendent, on at least two occasions, that bells would not be rung in the East Peoria yard for the purpose of warning the crew members, and that Rule 32 qualified Rule 30 in yard switching to prohibit bell ringing except for the purpose of warning persons whom the engineer knew to be in a position of danger. (Rec. 122.) And the various engineers and firemen with whom Tennant had previously worked testified to this same practice and interpretation of the rules. This evidence stands unrebutted in the record, and in the face of it how could it be presumed by Petitioner's counsel, or by a Court, that Tennant could have been relying upon a bell during this routine switching movement, particularly where there is not a scintilla of evidence that the engineer knew him to be in a position of danger at the time? But regardless of this, other possibilities arising from the circumstances indicate that Tennant may have been fully aware of the movement of the cars and that his own negligent conduct and not the failure to ring a bell caused the accident. Petitioner had the burden of establishing that Tennant came to his death as a direct and proximate cause of some negligent act, and, if we are to follow precedent and the rules of fair procedure in the trial of jury cases, conjecture is not enough, and Petitioner has failed to make sufficient proof under this record to present a jury question.

It has always been a rule of decision in Federal and State Courts that where there is an absence of direct evidence upon the cause of death and the circumstances give rise to a number of conflicting theories or possibilities of the cause of the injuries, for some of which the employer is not responsible, a jury will not be permitted to exercise conjecture or speculation in determining which theoretical assumption of facts might have been the effective cause of the death. One of the leading cases of this Court is *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391, where a brakeman was engaged in yard switching

work of breaking up and making up trains and of sorting the cars. It was alleged by the plaintiff that deceased was riding a cut of cars when other cars were negligently caused to be brought into violent contact with those upon which deceased was riding, causing him to be thrown underneath the wheels. One witness testified for the plaintiff on the subject of the alleged collision, but it appeared to the Court that he was standing so far away and his inattention was such that the loud crash he said he heard might not have been the one alleged to have caused the injuries. In the face of overwhelming testimony that there was no collision, as alleged, the Supreme Court looked upon the evidence of this witness as suspicious, and although it was noted that the credibility of witnesses was for determination by a jury, yet it concluded that the story of this witness, under the facts, was "simply incredible." The Court laid down the rule that a verdict based upon mere speculation is not permissible, saying, commencing on page 393:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. *United States F. & G. Co.* v. *Des Moines Nat. Bank*, (C. C. A.) 145 F. 273, 279, 280, and cases cited; *Ewing* v. *Goode*, (C. C.) 78 F. 442, 444; *Louisville & N. R. Co.* v. *East Tennessee, V. & G. Ry. Co.*, (C. C. A.) 60 F. 993, 999; *Tucker Stevedoring Co.* v. *W. H. Gahagan*, (D. C.) 6 F. (2d) 407, 410. * * *
>
> "(4) And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which

testimony it affirmatively appears that the fact sought to be inferred did not exist. * * *

"(5) We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120, 121, 22 L. Ed. 780. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 660, 21 S. Ct. 275, 45 L. Ed. 361. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476, 39 S. Ct. 540, 63 L. Ed. 1092, and cases cited; *Herbert* v. *Butler*, 97 U. S. 319, 320, 24 L. Ed. 958. The 'scintilla' rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuylkill & D. Improvement & R. Company* v. *Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S. Ct. 300, 69 L. Ed. 597; *Gunning* v. *Cooley*, *supra*; *Ewing* v. *Goode*, *supra*, (C. C.) at pages 443-444 of 78 F.

"(6) Leaving out of consideration, then, the inference relied upon, the case for respondent is left with-

out any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible. *C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Gulf, etc. R. R.* v. *Wells*, 275 U. S. 455, 459, 48 S. Ct. 151, 72 L. Ed. 370; *New York C. R. Co.* v. *Ambrose, supra; Stevens* v. *The White City, supra.*"

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, the Supreme Court affirmed the direction of a verdict for the defendant. There the plaintiff was a fireman on a passenger engine, and after the run and while the engine was being moved to the railroad yard plaintiff attempted to step from the engine, and in so doing claimed that the step turned so that he fell under the engine and his foot was amputated. It was alleged that there was a failure to have the engine step securely fastened. The evidence of plaintiff was based on mere inference or conjecture that there was something wrong with the step. The defendant introduced testimony showing that the engineer had used the step and found it secure, that competent inspectors had not detected any failure in its fastenings, that the step was in good condition when it left on the trip, and it was impossible to tell without guesswork, from the testimony, how the step had become loosened. Numerous theories were advanced as to how it might have occurred. The court said, on page 277:

"Upon these facts we make these observations: First, That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (*Stokes* v. *Saltonstall*, 13 Pet. 181, 1 L. Ed. 115; *New Jersey R. & Transp. Co.* v. *Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859) a different rule obtains as to an employee.

The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And, where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third, That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe."

In *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151, it appeared that Wells, a brakeman, ran to get on a moving train which was going about ten miles an hour, and he sought to prove that as he caught the grab iron the engineer gave the train an unusual jerk, which threw him to the ground, causing injuries. All the other members of the train crew were introduced as witnesses by the defendant, and their testimony was to the effect that it was not the duty of the engineer, before starting, to look out for the men who might be on the other side of

the train, and that when the engineer pulled out he did not know where Wells was; that he started in the ordinary way and did nothing which would cause a sudden or unusual lurch of the train; that after a freight train starts there are usually jerks or lurches caused by the running out of the slack between the cars, and that after this slack runs out the engineer could not give any jerk to the train, even by suddenly putting on steam. There was no rebuttal evidence, but it was urged in behalf of the plaintiff that despite this evidence the case should be submitted to the jury, since plaintiff's testimony was some evidence of negligence. The Trial Court did permit the case to go to the jury and there was a verdict for the plaintiff. However, the Supreme Court said, on page 152:

> "It is urged here in behalf of Wells that, despite this evidence, the question of the engineer's negligence was properly submitted to the jury because of an inference to be drawn from Wells' own statement that 'the engine gave an unusual jerk' which was more severe than any he had ever experienced or seen on a local freight train. We cannot sustain this contention. In the first place, there was no evidence that the engineer knew or should have known that Wells was not on the train, but was attempting to get on it after it had started and was in a situation in which a jerk of the train would be dangerous to him. See *Texas & Pacific Railway* v. *Behymer*, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905. Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had turned on the piece of coal and he had gone 'down', being plainly one in which he could not compare with any accuracy the jerk which he then

felt with those he had experienced when riding on freight trains.

"In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough. *Patton* v. *Texas & Pacific Railway*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361; *Chicago, M. & St. P. Railway* v. *Coogan*, *supra*, 478 (46 S. Ct. 564).

"As the jury should have been instructed to find for the defendant, we have no occasion to consider other questions which have been argued in reference to the charge to the jury."

One of the decisions of this Court most closely in point as to the facts is *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281. The Circuit Court of Appeals in the instant case has said that despite overwhelming evidence to the contrary there might be "slight" evidence of negligence. In the Toops case the Court found proof of negligence due to the violation of at least two operating rules of the company, but that the question whether these acts of negligence were the proximate cause of the accident depended upon mere speculation. There a freight conductor was found cut to pieces along the tracks following the switching movement. There were no eye-witnesses. The conductor knew the movement that was to take place, just as Tennant knew the next movement in the case at bar. It was charged that the railroad had failed to have a flagman on the leading car of the cut or to place a white light thereon at night, in conformity with its rules. It was also charged as negligence that the road bed was out of repair and had been allowed to become skeletonized. This Court said on page 282:

"(1, 2) But proof of negligence alone does not entitle the plaintiff to recover under the Federal Em-

ployers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979; *Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; *New York Central Railroad Co.* v. *Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, decided February 24, 1930.

"(3) Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. The only evidence relied upon by respondent to account for the deceased's presence at the point of the accident was that already stated, which indicated that he had proceeded to the elevator track in order, as he had said, to 'look out' for the kicked cars, whether by climbing onto them and controlling their movement on the elevator track, as is usual in such movements, or by assisting in the spotting movement to be later carried out, can only be inferred. It is the theory of respondent that he attempted to cross the track so as to be in a position to signal the engineer who was on that side of the train. But, as the grain cars already were, or about to be, uncoupled from the train, there was evidently no immediate purpose in his being so located. *What actually took place can only be surmised.* Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other or succeeded, and in either case, finally came to his death by falling under or between the moving cars is a matter of guesswork.

"(4, 5) Even though we make the doubtful assumption that the train was not within a 'yard,' and so was required to signal its movements, it is plain that de-

ceased and his train crew treated the place as a yard where warning of switching movements was not required. On respondent's own theory, deceased was fully cognizant of the contemplated movement. He knew that the grain cars were to be kicked onto the elevator track where he went to meet them, and knew that his train crew, consisting of only two brakemen, and the lanterns which they carried, would be needed in attending to the switching, signalling and uncoupling of cars in order to kick the train of stock cars onto the passing track, and that the grain cars for which he was to 'look out' would be without brakeman or warning light. It is presumed that deceased proceeded with diligence and due care. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 488, 26 S. Ct. 303, 50 L. Ed. 564. The movement of the fifteen cars to and across the switch and onto the elevator track in a quiet neighborhood on a still night cannot be assumed to have given no warning sounds of their approach.

"All these factors, taken together, render highly improbable the theory of respondent that deceased was run down by the grain cars while he was crossing or standing upon the track, and they give sharp emphasis to the absence of any proof of the fact, indispensable to respondent's case, that deceased, while standing on or attempting to cross the track, was struck by the leading car. There is no evidence to suggest that the body, after falling to the ground, was moved or dragged more than two or three feet. There were no marks of blood or flesh of the decedent upon any part of the leading car, although such marks were found on most, if not all, of the cars following. The kicked grain cars were moving slowly when they passed the switch to the elevator track as they came to a stop two or three car lengths west of the derail. It is true that there was medical testimony that in the case of crushing injuries bleeding might not immediately ensue, but the length of this period of delay was not mentioned, and the testimony given was not stated by any witness to be applicable to injuries of the extent and character suffered by the deceased. It does not account for the absence from the leading car of

the other evidences of the injury found on the other cars. As evidence to support the special finding of the jury that the deceased was struck by the first car, this testimony is without substance. See *Gulf, Mobile & Northern R. R.* v. *Wells*, 275 U. S. 455, 48 S. Ct. 151; 72 L. Ed. 370. If allowed to sustain the verdict, it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

It will be noted that in the Toops case plaintiff sought to establish that decedent was run over by the leading car while standing on or crossing the track, due to a failure to give warning. In the instant case Plaintiff has advanced the hypothesis that Tennant was injured by the engine while standing on the track, due to failure to give warning. In both cases there was no evidence of blood on the leading cars. In both cases there existed the same possibility that the decedent, knowing of the movement of the cars, had sought thereafter to climb upon or through the moving train, in which event the accident might have been caused by decedent's own negligent act, with no causal connection whatsoever with any alleged violation of a rule.

A somewhat similar situation is presented in the case of *Reading Co.* v. *Boyer*, 6 Fed. 2d. 185, where Boyer, the brakeman, who was to make a cut in the switching operation was riding in the engine. It was night. On approaching the switch he was seen to take his lantern and pass toward the steps, between the engine and the car. The engineer heard the safety chains drop, indicating that he was about to alight. This was the last seen or heard of Boyer alive. His mutilated body was found between the main track and siding near the switch. No one knew how the accident occurred, but plaintiff relied upon inferences that it might have happened from various causes. The Court, on page 186, said:

"How he met his death no one knows. Whether in descending the wet steps he fell from the tender, or in

alighting he was thrown under the train because of insecure footing in an unballasted place, or, after safely alighting, he was struck through some fault of the railroad company *or of his own* were questions left to the jury. Until the jury found how he had died, they, of course, could not find the cause of his death, and until they found the cause of his death they could not determine whether it was due to negligence and whether the negligence, if any, was that of the defendant. * * *

"It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other."

A late case which has recently been reviewed by this Court is *Brennan* v. *Baltimore & O. R. Co.*, 115 Fed. 2d. 555. There the Circuit Court of Appeals for the Second Circuit found that evidence of negligence of the railroad as a cause of derailment of a car was insufficient for the jury in view of the physical circumstances, which refused plaintiffs evidence that he had properly performed his duties. The Court held plaintiff's assumption of the cause of the accident to be mere conjecture and incredible, and relied upon the case of *Pennsylvania R. R. Co.* v. *Chamberlain (Supra)*. The Court held that defendant's motion for a directed verdict should have been granted, further saying that the evidence did not rise above the level of mere speculation, and failed to provide the substantial evidence of negligence required to prove plaintiff's cause of action. Certiorari was denied in *Brennan* v. *Baltimore & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614.

Another late case which depended upon *Pennsylvania R. R. Co.* v. *Chamberlain* and in which certiorari was denied by this Court is *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248. In this case a car was shunted in a yard toward

some track laborers without warning. The testimony was that there was a custom among the track laborers that one of their number was to act as a lookout and that Willis had been so delegated. Willis was killed by the car and the case was first permitted to go to the jury, resulting in a large verdict. It was argued by counsel that the jury was free to discredit the testimony that Willis was to act as watchman, even though there was no testimony to the contrary. This would have left the jury free to conjecture as to the cause of the injuries. The Court held that a verdict based on such finding could not stand. A petition for certiorari to this Court was denied on November 10, 1941 in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187.

In a still later case in which the Circuit Court of Appeals for the Ninth Circuit based its decision upon *Atchison, Topeka & S. F. R. Co.* v. *Toops* (hereinbefore cited as strongly comparable to the case at bar) is *Deere* v. *Southern Pacific Co.*, 123 Fed. 2d. 438. In that case it was charged that decedent was killed while operating a motor car when he was run down by a train, due in part to the failure of the employer to provide sufficient help to remove the vehicle from the track. Decedent was endeavoring to remove the motor car by himself, but the Circuit Court of Appeals noted that he was free to handle his own movements and might have stepped aside to a safe position had he chosen. It was said on pages 441 and 443:

> "With regard to the first charge of negligence, we agree with appellant that when failure to provide sufficient help results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers' Liability Act (*Chesapeake & Ohio Ry. Co.* v. *Winder*, 4 Cir., 23 F. 2d. 794), but to permit recovery in such case it must be shown that such failure was the proximate cause of the accident. *Marshall* v. *Chicago, etc., R. Co.*, 131 Minn. 392, 155 N. W. 208; *Strunks* v. *Payne*, 184 N. C. 582, 114 S. E.

840. To recover plaintiff is required to prove not only that the railroad was negligent, but that the injury resulted proximately from that negligence. *Healey v. New York, O. & W. R. Co.*, 2 Cir., 79 F. 2d. 542. Here, the plaintiff contends that the speeder was too heavy for decedent to handle properly. But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point. * * *

"In order for recovery to be allowed under the Federal Employers' Liability Act there must be evidence from which a jury could find that there was negligence on the part of the defendant, which negligence was the cause of the employee's injury. *Atchison, T. & S. F. R. Co. v. Toops*, 281 U. S. 351, 50 S. St. 281, 74 L. Ed. 896."

A petition by plaintiff to this Court for writ of certiorari was denied on March 30, 1942 in *Deere v. Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916.

Other corollary principles in line with the foregoing decisions are as follows:

The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendant must have been guilty of some act of negligence which was the proximate cause of the injury. *Reese v. Philadelphia & R. R. Co.*, 239

U. S. 463, 36 Sup. Ct. 134; *Wheelock* v. *Freiwald*, 66 Fed. 2d. 694.

A mere scintilla of evidence is not sufficient to sustain a verdict in favor of a plaintiff, but the evidence must be substantial, not vague or uncertain. *Commercial Casualty Ins. Co.* v. *Marjorie Stinson*, 111 Fed. 2d. 63, Petition for Certiorari denied by this Court in *Stinson* v. *Commercial Casualty Ins. Co.*, 311 U. S. 667, 61 Sup. Ct. 25, on October 14, 1940.

Suggestions of counsel, however plausible, cannot take the place of evidence. *United States* v. *Coal Cargo*, 11 Fed. 2d. 805, Certiorari denied, *United States* v. *Cargo*, 273 U. S. 696, 47 Sup. Ct. 92.

Evidence, "however slight," is insufficient to take a case to a jury under the Federal Rule. Where the evidence on one side is overwhelming, so as to leave no doubt as to the facts, the Court should give a peremptory instruction to the jury. *Gunning* v. *Cooley*, 281 U. S. 90; 50 Sup. Ct. 231.

In the instant case the Circuit Court of Appeals first analyzed the record in the light most favorable to the Plaintiff to determine if there was evidence of negligence sufficient to require submission to the jury. The question depended upon whether the rules and practices of the defendant in the East Peoria yards required the ringing of a bell to warn a switchman performing duties similar to those of Tennant. It was held that the evidence was overwhelmingly against this contention. Thereafter the lower Court concluded that "any proof of negligence, *however slight*, is sufficient to present a jury question." We do not believe this to be the rule in the Supreme Court, and say that there is neither *substantial* proof of negligence in this record nor *substantial* proof that the alleged negligence was the proximate cause of the accident.

This Court has not changed its long standing rules for the degree of proof required in jury trials. In *Tiller* v.

Atlantic Coast Line R. Co., 63 Sup. Ct. 444, this Court, on page 451, quoted from older decisions of the Supreme Court and reannounced the rule that *disputed questions of fact* were for the jury, saying, on page 451:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal *to decide disputed questions of fact*, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, etc., R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where *the facts are in dispute, and the evidence in relation to them* is that from which fair-minded men may draw different inferences,' the case should go to the jury."

By the aforesaid language this Court has never said that "slight" evidence is sufficient to require submission to a jury. There is no decision of this Honorable Court which has ever indicated that *slight* evidence or a *scintilla* of evidence, or anything less than *substantial* evidence is sufficient. We believe that if this Court will analyze the record as carefully as did the Court below, it will likewise conclude that the evidence was overwhelmingly against Plaintiff's contentions of negligence, and that it will conclude that there exists in this record no substantial evidence of negligence.

In view of this state of the record, it is believed that the Supreme Court should have before it some of the cases upon which we relied below to demonstrate that no negligence on the part of Respondent was shown. For example, this Court has announced the rule that where the injured person is not a member of the class of persons for whose benefit a warning signal should be given, he cannot recover because of a failure to give the signal. *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, 46 Sup. Ct. 495; *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. 42; *Central Vermont Ry.* v. *Sullivan*, 86 Fed. 2d. 171; *Nor-*

folk & W. Ry. Co. v. *Gesswine*, 144 Fed. 56. We contended below that it was neither alleged nor proved in this case that Tennant was of the class of persons entitled to a bell warning under the rules, since under the testimony of the interpretation and practices, bells were not rung for the purpose of warning a person not known to be in a position of danger. Where neither the engineer nor fireman knew that employees had located themselves in a position of danger, there is no negligence in failing to give such person a warning signal. *Douglas* v. *Washington Terminal Co.*, 298 Fed. 199; *Mullin* v. *Louisville & N. R. Co.*, 261 Fed. 156. The failure to ring bells in railroad yards is not a dangerous practice *per se*. The ringing of bells and the sounding of whistles on trains going and coming and the switch engines moving forward and backward would merely tend to confusion. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835. There is no support for the assumption that Plaintiff was without knowledge of the switching practices followed in the yard, since on the evidence it must be held that he knew how switching was done and the members of his crew had a right to believe that he would observe care and keep out of the way of the train movement. *Toledo, St. Louis & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

However, even assuming that negligence did exist, this Court must then determine from the evidence whether such alleged negligence was the proximate cause of Tennant's death. As to this phase of the case, the Court below found that the cause of decedent's death was shrouded wholly within the realm of speculation and conjecture. (Rec. 307.) This result was reached by a Court striving to find something in Plaintiff's favor, but which was compelled to acknowledge that one could only guess or surmise as to the cause of the accident. Under the many decisions of this Court which we have hereinbefore cited, a verdict cannot be permitted to stand which rests upon conjecture.

surmise or speculation; and where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and say that the negligence of the employer was the real cause. In the case at bar, for these reasons, there was no case for a jury.

As was stated by Justice Cardozo in *Shapleigh, et al.* v. *Mier*, 299 U. S. 468, 57 Sup. Ct. 261, at page 264:

> "To the contrary, a Court that is left without knowledge of a fact, after exploring to the full every channel of information, must needs decide against the litigant who counts upon the fact as an essential of his claim."

II.

The Circuit Court of Appeals found that the cause of deceased's death, particularly Plaintiff's theory, was shrouded wholly within the realm of speculation and conjecture. In the preceding part of this argument we have shown that no one saw or knew anything about the occurrence; that the circumstances had only given rise to a series of possibilities or hypotheses as to the cause of death, for virtually all of which Defendant was not responsible; and that this Court has many times held that in this state of the record there is no question for a jury. Petitioner's theory, which is merely one of a number of conjectures in the case, was advanced to the Court below and is somewhat similarly presented to this Court. It is that Tennant was about the north or rear end of the engine, protecting the cut, when he was run over, due to the failure to ring a bell. We have hereinbefore shown that under the uncontroverted testimony he could not have been expecting a bell because, in addition to other evidence, his own crew, with which he had worked for many nights prior,

did not use the bell in yard switching to warn crew members not known to be in a position of danger; and we have shown that no one knew Tennant to be in such a position. Nevertheless, let us analyze Petitioner's theory of the case in the light of the authorities. Let us consider whether, even if Petitioner's theory were to be considered as the sole and only implication in the case to be drawn from the circumstances, it shows any cause of action.

We say that under Petitioner's theory Tennant failed to use ordinary care for his own safety, violated company rules promulgated for his own safety, and that his injuries were directly and proximately caused by his own negligence. If, as Petitioner contends, Tennant remained at or about the north or rear end of the engine, he must have been located between the rails. Had he been standing outside the rails he would not have been run over when the engine moved toward him. Had he been standing outside the rails, Harkless and Bonner, the other members of the crew, would have seen his lantern; but they looked just prior to the reverse movement of the engine and did not see Tennant or his light any place. (Rec. 84, 233.) These men were stationed near the end of the cut, on its west side, when a signal to reverse the engine was given. (Rec. 53, 54, 233.)

From the time Tennant placed his raincoat in the compartment underneath the engine cab, England, the engineer, did not see him. England was keeping a lookout toward the south for signals along the west side of the cut, and when Tennant walked out of his vision, around the north or rear of the engine, that was the last England saw of him that night. (Rec. 196, 197.) England further testified that before he started his engine for the reverse movement, he looked toward the front footboard and also toward the rear footboard. He did not see Tennant on either footboard. (Rec. 200.) Fireman Cole, on the east side of the cab, saw nothing of Tennant as the train started

to move out, although he was then keeping a lookout. (Rec. 218.)

From this undisputed testimony we can only conclude that Tennant had got himself out of sight of both the engineer and fireman as well as the other crew members. He was obviously not standing on the rear or north footboard of the engine where Harkless has said that there were handholds which were all in order and in good condition. (Rec. 86.) Petitioner argued below that he was not on the footboard. The engine moved out without roughness (Rec. 218), and indeed there is no charge of negligence that there was any rough handling. Therefore, under Petitioner's theory, it is to be assumed that Tennant had elected to perform his duty of protecting the cut, according to Petitioner's theory, by standing between the rails, to the north or rear of the engine, and so close to the engine that he could not be seen.

No superior officer told Tennant to protect the cut in this manner. To the contrary, it will be remembered that his foreman, Harkless, testified that if Tennant remained with the engine he must observe care for his own safety. This is, therefore, not a case of an employee being ordered into a dangerous position by his superior; but Tennant, in sole charge of protecting his end of the cut, had the election of standing in a safe position, and in fact had a duty to do so. He chose the perilous and unsafe position between the rails.

Pursuing Petitioner's theory further, we find from the uncontroverted facts that there was available to Tennant a safe way of remaining near the engine. He could have stood on the ground, outside the rails, in perfect security. He could have stood on the footboard, where he could have held onto the handholds, the safety appliances placed there to prevent such an accident. He did not do either of these things.

Rule 702 required switchmen to be in position where they could see signals and know that they were being understood and obeyed before going into a dangerous position. (Rec. 117-118.) Tennant knew from previous experience with this routine operation, which had always been done before in substantially the same manner (Rec. 76), that a signal would be given by the foreman direct to the engineer, which would cause the cut to be backed in his direction. He was an experienced man. (Rec. 76.) He had been twice instructed in the rules of the company. Yet, in violation of said Rule 702, he first went to the dangerous position and chose to place himself where he could not see this signal when the same was given. Under Petitioner's theory, Tennant could hardly have selected a place more unsafe for the performance of this alleged duty. There might have been another slacking operation which would have run him down, and Petitioner's own witness has said that such operations were done without the bell signal. (Rec. 80-81.) He did not tell the engineer or any one else that this was where he was going to stand. He knew the engine would move any minute, yet took no action when one step to the right or left would have saved him. He must have heard the hissing of the air when the engineer released the air brakes, a sound which could be heard a car length away. (Rec. 88.) This must have warned Tennant that the engineer had received a signal and that the engine would move. Still he remained between the rails, in the darkness, out of sight, a few feet from this locomotive. There would have been time for an alert man to step outside the rails to safety. The next thing the engineer had to do was to shift the gear and put the Diesel in reverse. (Rec. 88.) Thereafter the engineer would open the throttle. Harkless has testified that it was necessary for the engineer to do those things to comply with his signal to pull the cars out of Track "B-28" on the night of July 12, 1940. (Rec. 88.) If Tennant was at-

tentive, if he was alert, he was given an opportunity of extricating himself from his voluntary position of peril. Concede that he was depending upon a bell signal, although this is not in conformity with the evidence, he already knew from the hissing of the air brakes that the engine was about to move. There is no evidence in the record as to how long before an engine movement a bell was ever rung. Was it but momentary, or almost simultaneous with the movement? The record is silent. Already knowing that an engine several feet away was about to move in his direction, would a sane man dare fate by waiting still longer for a bell which might not be rung in time to provide means of escape? The only logical assumption of facts to explain his behavior is that he had elected to mount the footboard of the engine from between the rails, which constituted a violation of the general rules of the company prohibiting an employee from standing on the track before an approaching engine for the purpose of boarding the same (Rec. 117); or that the man had become completely inattentive, perhaps sitting on the footboard asleep, as the Circuit Court of Appeals has suggested.

We repeat that Tennant did not observe due care and caution for his own safety; that he violated a rule designed to prevent such an accident; and that he failed to carry out his duty as outlined by Harkless, which was to observe care for his own safety. His own negligence was the direct and proximate cause of his death. From the time he left the sight of England he might have carried out his duties of protecting the cut in a safe manner, but elected to choose a desperately dangerous method.

In the case of *Gilbert* v. *Burlington C. R. & N. Ry. Co.*, 128 Fed. 529, it was said, at page 534:

> "Where there is a comparatively safe and a more dangerous way known to a servant, by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method."

In *Deere* v. *Southern Pacific Co.*, 123 Fed. 2d. 438, previously noted in this brief, where the plaintiff was refused a writ of certiorari by this Court in *Deere* v. *Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916, the facts were that decedent was attempting to remove the speeder from the path of an approaching train. He could have stepped aside to safety, but waited too long and was killed. The lower Court said:

> "He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances, reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point. * * *
>
> "In order for recovery to be allowed under the Federal Employer's Liability Act there must be evidence from which a jury could find that there was negligence on the part of defendant, which negligence was the cause of the employee's injury. *Atchison, T. & S. F. R. Co.* v. *Toops*, 281 U. S. 351, 50 S. Ct. 281."

This case covers Petitioner's theory of Tennant's death, for under the undisputed evidence, Tennant, if alert, knew of the impending train movement and elected to remain in his position of danger too long. During the entire ten minute wait it was within his option and volition to remain safely alongside the engine, while still protecting the cut, which would have been the safe way to perform his duties. No superior ever told Tennant to protect the cut in the negligent manner in which he is said to have attempted this duty.

In *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, in which plaintiff was denied a writ of certiorari by this Court on November 10, 1941, in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187, the testimony was that Willis was to look out for cars which were being switched in the direction of his group of track workmen. The fact that

he was run over was an indication that he was not carrying out his duty and that he was not observing due care and caution for his own safety. The lower Court said:

> "The recent Amendment, 45 U. S. C. A. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

The above case held that where decedent neglected his own personal duty to act as a watchman, this constituted the sole cause of his death. That case depended upon *Davis* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33, and *Unadilla Ry. Co.* v. *Caldine*, 278 U. S. 139, 49 S. Ct. 91. In the latter case Justice Holmes, in denying a plaintiff recovery, where the man was in charge of his own actions, laid down a governing rule in cases of this type, as follows:

> "He cannot hold the company liable for disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

In the case at bar, if we are to still follow Petitioner's theory, we have a switchman undertaking the duty of protecting the cut, with perfect freedom of action as to how he accomplished the duty, so long as he observed care for his own safety. In so doing, he chose to violate Rule 702, which required him to be in a position to observe signals and to know that they were being obeyed before placing himself in a position of danger, and perhaps was in the course of violating the rule against mounting a footboard from the center of the track, both of which rules were designed and promulgated for the express purpose of preventing just this sort of accident. *As we have said before, this much we know, that if Tennant had carried out his alleged duty of protecting the cut in the safe way that was open to him, by remaining alert, standing near the engine, outside the rails, or standing on the footboard making use of the safe handholds there available, the injury would*

never have occurred. In short, Petitioner's theory or conjecture that Tennant was carrying out his duties in the exercise of due care has no support from the known facts. And if the Court is to take said theory as an admission, then Tennant's conduct and violation of rules preclude recovery under the decisions of this Court. The various cases cited by Petitioner are those in which there is some conflict or dispute in the testimony, which always, of course, makes a jury question.

The Tiller case, upon which Petitioner heavily relies, is totally dissimilar as to facts. There it was *known* that the decedent was carrying on a duty of inspecting seals on cars along a track where the distance from the adjacent track was reduced by the overhang of cars moving in opposite directions three feet seven and one-half inches. The Circuit Court of Appeals in that case found that there was some evidence that the movement of the track where Tiller was killed was an unusual one and probably not expected by him. *There is no element of doubt or conjecture in the Tiller case* as to where the decedent was standing or what he was doing, and there was an issue of fact as to whether the car movement was unusual. In the instant case the car movement which ran over Tennant was routine and was to have been expected by the decedent. Here it is unknown whether Tennant was performing any duty or not, and it is unknown where he had actually stationed or posted himself. A series of conjectures or theories, of which Petitioner's theory is but one, is all that has been presented to the Court. Had he attempted to rest on the pilot beam in accordance with his previous habits, or had he dozed off or fallen in getting up or down from this perch? Had he gone around the north end of the engine to the east side of the cut, as Plaintiff's witness Harkless said he might have done (Rec. 86), and then when the train started to pull out sought to get back on the proper side of the train where signals were being given? Was he, knowing of the

train movement without the necessity of any bell warning, attempting to climb through the moving cars between the second and third car of the cut, in violation of a rule expressly forbidding such an act? Was he attempting to examine or pick up the attractive galvanized spring between the rails, near which his hand was found? Did he, from some unknown position, know that the train was about to move or was moving, and did he thereafter attempt the dangerous act which resulted in his death?

There is a total absence of direct evidence as to the cause of Tennant's death. Only some known circumstances remain from which one can only guess or surmise what occurred. Here is no question of disputed evidence for a jury,—there is no evidence,—only a series of speculative assumptions as to the cause of death, for most of which defendant is not responsible. We do not believe that any "substantial" evidence of negligence was here proved under the Federal Rules, but even though such be assumed, Petitioner then has not met the next burden of a plaintiff to prove by substantial evidence that the alleged negligence was the cause of death. Repeating again the words of this Court in *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, at page 277:

> "And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between those half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

And, as was further said in that case, no mere sympathy for the unfortunate victim of an accident justifies any departure from the settled rules of proof resting upon all plaintiffs.

Conclusion.

The United States Circuit Court of Appeals for the Seventh Circuit has given this record exhaustive consideration. Its opinion has only to be read to see that, as Judge Major stated, the evidence and all inferences reasonably to be drawn therefrom were analyzed in the light most favorable to Plaintiff. When it reached the question of proximate cause, the Court was compelled to find that there was no substantial evidence in support of Plaintiff's case, since the actual cause of death was "shrouded wholly within the realm of speculation and conjecture". No other determination was possible under the long settled rules of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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